UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD EXECUTIVE SECRETARY OF THE BOARD

HOSPITAL ESPAÑOL AUXILIO MUTUO DE PUERTO RICO, INC.

And

CASE 24-RC-074621

UNIDAD LABORAL DE ENFERMERAS(OS) Y EMPLEADOS DE LA SALUD (ULEES)

APPEAL FROM REGIONAL DIRECTOR'S REPORT AND RECOMMENDATION ON OBJECTION AND NOTICE OF HEARING

BEFORE THE EXECUTIVE SECRETARY:

COMES NOW, Hospital Español Auxilio Mutuo de Puerto Rico, through the undersigned counsel, and very respectfully states, avers and prays as follows:

I. STATEMENT OF THE CASE

Pursuant to a Stipulated Election Agreement executed by the parties and issued and approved by the Regional Director for Region 24 on March 6, 2012, an election by secret ballot was conducted on March 23, 2012, among all full time licensed practical nurses and nurses aids employed by Hospital Español Auxilio Mutuo de Puerto Rico (herein "Employer) at its San Juan facility. The election was conducted between Unidad Laboral de Enfermeras(os) y Empleados de la Salud (herein "Petitioner"), and two Intervenors, Comite Unionados de Enfermeros Prácticos del Auxilio Mutuo (herein "Intervenor Comite"), and Asociación Internacional de Maquinistas

y Trabajadores Aeroespaciales (herein "Intervenor IAM"). Following said election, the parties were furnished a tally of ballots which showed that of approximately two hundred and seventy seven (277) eligible voters, two hundred and nine (209) valid ballots were casted, of which thirty (30) were for Petitioner, ninety four (94) votes were for Intervenor IAM, twenty two (22) votes were for Intervenor Comite, sixty three (63) votes were against the participating labor organizations, and one (1) ballot was challenged. The challenges were insufficient in number to affect the results. Thereafter, on March 30, 2012, Petitioner filed timely objections to conduct affecting the results of the election.

In conformity with Section 102.68 of the Board's Rules and Regulations and pursuant to the Stipulated Election Agreement, Acting Regional Director for Region 24 caused an investigation to be made of the objections and on April 20, 2012, the Board issued its Report and Recommendation on Objections and Notice of Hearing.

The Board has recommended that nine (9) of the seventeen (17) objections raised by Petitioner be resolve in a hearing². Said objections allege, generally, that the Employer allowed representatives from Intervenor IAM and Intervenor Comite, to actively campaign among the practical nurses, within the hospital premises, while prohibiting Petitioner's representative to have access to said nurses.

Report and Recommendation on Objections and Notice of Hearing, April 20, 2012, Case 24-RC-074621.

The Acting Regional Director's Report ordered that issues raised by Petitioner's Objections 1,2,5,6,7,8,12,14, and 15 were to be heard in a hearing. Objections 1,2,5,6,7, and 8 relate to Employer conduct and Objections 12, 14, and 15 pertain to Intervenor IAM conduct.

In accordance with NLRB decisions and applying the standards set forth in them, Petitioner's assertions do not constitute grounds for setting aside the election whereas the Employer conduct alleged in said objections have not reasonably tended to interfere with the employees' free and uncoerced choice in the election process and whereas Petitioner's objections relate to conduct by Petitioner's business agents prohibited by Employer's no distribution/solicitation rule.

Accordingly, we respectfully appeal from the Report and Recommendation on Objections and Notice of Hearing pursuant to the provisions set forth in Section 102.69 of the National Labor Relation's Board's Rules and Regulations based on the following grounds.

II. <u>DISCUSSION OF GROUNDS</u> IN SUPPORT OF APPEAL:

As previously discussed, Petitioner's Objections refer to Employer's alleged refusal to allow Petitioner access to practical nurses and the denial of distribution of its campaign propaganda within the hospital's premises and facilities, notwithstanding Employer's acquiescence to Intervenors' propaganda distribution.

Petitioner's arguments relating to said prohibition rest on the allegations that during the month of March 2012, the Employer, through its agents, denied Petitioner's business agents access to Employer's facilities designated for patient treatment, including the second floor Medicine Department of the San Vicente Building, fourth floor Medicine Department, hospital's fifth floor, External Clinics located in the ninth floor, and the entrance door of the Emergency Room.

It is a well established fact that the Board does not lightly set aside representation elections. For that reason the burden of proof on the party seeking to have a Board-supervised election set aside is a heavy one. Consequently, an objecting party must show by specific evidence not only that the improper conduct occurred, but also that it interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election. Antioch Rock & Ready Mix, 327 NLRB No. 187; Werthan Packaging, Inc., 345 NLRB No. 30 (2005); <u>Kux Mfg</u>., 890 F.2d 804, 808(6th Cir. 1989); <u>Chicago Metallic</u> Corp., 273 NLRB 1677 (1985); Avante at Boca Raton, Inc., 323 NLRB 555, 560 (1997); Baja's Place, 268 NLRB 868 (1984); Lockheed Martin Skunk Works, 331 NLRB 852 (2000). Consequently "a party objecting to the validity of an election on the grounds of improper pre-election or election conduct must shoulder a heavy burden of proof to demonstrate by specific evidence that the election was unfair." Boca Raton, supra, citing NLRRB v. Mattison Machine Works, 365 US 123,124 (1961).

In accord with this principle, the Board has construed a set of standards by which to judge whether conduct-by either party- will be sufficient to set aside an election. It is an accepted standard that the determining factor in this type of decision is whether the conduct has a tendency to interfere with the employees' freedom of choice. Taylor Wharton Harsco Corp., 336 NLRB 157, 158 (2001) citing Cambridge Tools Mfg., 316 NLRB 716 (1995). In deciding whether the employees could freely and fairly exercise their choice in the election, the Board evaluates the following factors: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees

in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote, and (9) the degree to which the misconduct can be attributed to the party. <u>Vertis</u>, <u>Inc.</u>, 2011 NLRB LEXIS 743; <u>Avis Rent-a-Car</u>, 280 NLRB 580, 581 (1986).

After a careful evaluation of all of these factors, the Employer's conduct, even if proven to have occurred, when considered cumulatively, would not reasonably tend to interfere with the employees' free and uncoerced choice in the election. The Petitioner's objections refer to alleged Employer conduct that, if taken as true, is insufficient to amount to the type of behavior that would create an atmosphere of fear or coercion considerable enough to affect the employee's freedom of choice. The Employer's alleged conduct is based in few incidents during the month of March, namely March 7 and March 21, which not only, if true, would have been inconsequential in interfering with the employee's freedom of choice, but entailed conduct prohibited by the Employer's no distribution/solicitation rule.

The Employer's no distribution/solicitation rule, concerning non-employees, is clear and unambiguous when it prohibits third parties from distributing any type of material inside Employer's facilities. Petitioner's objections are grounded in the enforcement of this rule and have no basis to sustain that enforcement of said rule has in any way

interfered with employees' ability to freely and fairly exercise their choice in the election. "A hospital's primary function is patient care and that solicitation at any time in patient care areas might be unsettling to the patients, the Board and the courts have ruled that solicitation may be restricted even during non-working time in patient care areas of a hospital". Beth Israel Hospital v. NLRB, 437 U.S. 483 (1978); Asociación Hospt. Del Maestro Inc. V. NLRB, 842 F.2d 575 (1st Cir. 1988).

In other respects, "the right of employees to self-organize necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite." <u>Baptist Medical System v. NLRB</u>, 876 F.2d 661 [131 LRRM 2567] (1989) citing <u>Beth Israel Hospital v. NLRB</u>, 437 U.S. 483, 491 (1978). However, said rights may conflict with the rights of employers to maintain discipline and productivity and to control access to their property. <u>Baptist Medical System</u>, supra.

Accordingly, the general rule is that an employer cannot be compelled to allow distribution of union literature by non-employee organizers on his property. Lechmere, Inc. v. NLRB, 502 U.S. 527,533 (1992). To this extent, the Babcock Court, construed a substantive distinction between the rights of those who are employees of a given employer and of those who are not. Babcok recognized that an employer's duty to allow organizational activity by non-employees on the jobsite is far less extensive than its duty to allow such activity by employees. NLRB v. Babcok & Wilcox Co., 351 U.S. 105 [38 LRRM 2001] (1956). Hence, it has been noted that Section 7's organizational rights apply only derivatively to non-employee union organizers. Albertson's Inc. v NLRB,

301 F.3d 441 (6th Cir. 2002)citing <u>Lechmere</u>, supra and <u>Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters</u>, 436 U.S. 180 (1978)."By its plain terms, the NLRA confers rights only on employees, not on union or their non-employee organizers." <u>Lechmere</u>, 502 U.S. at 532.

It was Petitioner's business agents who intended to distribute propaganda campaign inside the designated patient care and treatment areas of Employer's facilities and during nurses working hours. As non-employees, Petitioner's business agents had no absolute right to solicit and distribute campaign propaganda in Employer's facility, more so in patient care and treatment areas, as admitted by Petitioner. The Employer had no obligation to allow Petitioner's business agents to solicit or distribute on Employer's property, specially when other means of communication could have been available, enabling Petitioner's business agents to reach the nurses with its message, and whereas the solicitation and distribution sought by Petitioner was to be held inside the Employer's patient care and treatment areas.

Furthermore, it is a known fact to the Region that Petitioner is the certified representative of four bargaining units in Employer's facility, and as such must be well aware of Employer's no solicitation/distribution rule. In addition, Petitioner, contrary to its objections, had an advantage over the Intervenor labor organizations, considering that by virtue of the collective bargaining agreements of said bargaining units, Petitioner had readily available channels of communication, including

³Petitioner represents the following bargaining units in Employer's facility: Registered Nurses, Technical employees, Maintenance employees, and office clericals; cases: 24-RC-7677,24-RC-5970;24-RC-7924.

bulletin boards⁴ in the main lobby, cafeteria, and next to punch clocks, to convey its message to the practical nurses and nurses aids in this election. Likewise, the practical nurses and nurses aids that voted in the election work side by side with fellow employees members of Petitioner's bargaining units constituting this an additional means of communication for Petitioner.

Moreover, the election in this case was not close, receiving Petitioner only thirty (30) votes out of the two hundred and nine (209) cast votes, and in addition there is no demonstration that a substantial number of nurses were affected with the alleged Employer's misconduct.

HENCEFORTH, is respectfully requested that Petitioner's election objections be dismissed and the election process be continued.

RESPECTFULLY SUBMITTED:

This 17th day of May of 2012 in San Juan, Puerto Rico, for Washington, DC.

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PATRICIA SILVA MUSALEM

⁴ See "General Provisions" Article for each bargaining unit attached hereto.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Appeal have been_served on this same date, by hand, to the attention of Martha Figueroa, Regional Director (Region 24), at their office facilities at La Torre de Plaza, Suite 102, 625 F.D. Roosevelt Avenue, San Juan, P.R; Harold Hopkins, Esq.; 84 Mayagüez St., Hato Rey, PR 00918; José M. Rodríguez Baez, PO. Box 19689, San Juan, Puerto Rico 00910-1689, William H. Haller, Associate General Counsel, 9000 Machinist PL., Upper, Marlboro, MD 20772 and electronic mail to Alvaro Alvarez Robles, at electronic address unionhospital2012@gmail.com.

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JULIO IVAN LUGO MUÑOZ

PATRICIA SILVA MUSALEM

COLLECTIVE BARGAINING AGREEMENT

BETWEEN

HOSPITAL AUXILIO MUTUO DE PUERTO RICO, INC.

AND

UNIDAD LABORAL DE ENFERMERAS (OS) Y EMPLEADAS (OS)

DE LA SALUD

REGISTERED NURSES

2010-2012

ARTICLE XXV GENERAL PROVISIONS

1. ...

2. ...

3. The Hospital shall keep, as at present, bulletin boards in the main "LOBBY", the cafeteria, and next to the general clock puncher so the Bargaining Unit posts notices, citations or any other written material necessary for its communication with the unionized employees. Notwithstanding, the Bargaining Unit shall not post in said bulletin boards, any written material that can be considered harmful, hurtful, or disrespectful or that in any form contains or represents propaganda against the good name of the company.

ARTICULO XXV

DISPOSICIONES GENERALES

1. El Hospital dispondrá de un medio adecuado para que los empleados cubiertos por este Convenio registren su asistencia al trabajo. En el sistema de registro de ponches que el Hospital tiene instalado convenientemente, el empleado personalmente registrará la hora de entrada y salida y la hora en que empieza y termina su período para toma de alimentos con su tarjeta de identificación.

2. Cualquier notificación o comunicación escrita requerida por este Convenio, deberá ser enviada por una parte a la otra por correo o entregada personalmente con la firma de un recibo por parte de quien la reciba.

3. El Hospital mantendrá como hasta el presente tablones de edictos en el "LOBBY" principal, la cafetería y junto al reloj ponchador general para que la Unidad Laboral fije avisos, citaciones o cualquier otro material escrito que sea necesario para su comunicación con los empleados unionados. Disponiéndose que la Unidad Laboral no podrá fijar en dichos tablones de edictos ningún material escrito que se considere lesivo, hiriente o irrespetuoso o que en forma alguna contenga o represente propaganda contra el buen nombre de la empresa.

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COLLECTIVE BARGAINING AGREEMENT

BETWEEN

HOSPITAL AUXILIO MUTUO DE PUERTO RICO, INC.

AND

UNIDAD LABORAL DE ENFERMERAS (OS) Y EMPLEADAS (OS)

DE LA SALUD (ULEES)

UNIT A

2011-2014

ARTICLE XXV

GENERAL PROVISIONS

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B. ...

- C. The Hospital shall keep bulletin boards adjacent to the cafeteria so the Bargaining Unit may post notices, citations or any other written material not considered harmful, hurtful, or disrespectful or that in any form contains or represents propaganda against the good name of the company. To this effect, bulletin boards shall be kept in de following areas:
 - Next to the clock puncher in the entrance of Information of the Old Building;
 Cafeteria; 3. Main "Lobby".

ARTICULO XXVI

DISPOSICIONES GENERALES

El Hospital dispondrá de un medio adecuado para que los empleados cubiertos por este Convenio registren su asistencia al trabajo. En el sistema de registro de ponches que el Hospital tiene instalado convenientemente, el empleado personalmente registrară la hora de entrada y salida y la hora en que empieza y termina su periodo de tomar alimentos.

Cualquier notificación o comunicación escrita requerida por este Convenio, deberá ser enviada por una parte a la otra por correo certificado o entregada personalmente con la firma de un recibo por parte de quien la reciba.

El Hospital mantendrá tablones de edictos contiguos a la cafetería para que la Unidad Laboral fije avisos, citaciones o cualquier otro material escrito que no considere lesivo, hiriente o irrespetuoso o que en forma alguna contenga o represente propaganda contra el buen nombre de la empresa. A esos efectos, se mantendrá tablones de edictos en las siguientes áreas:

1. Al lado del ponchador de la entrada a Información del Edificio Antiguo; 2. Cafeteria; 3. "Lobby" principal.

Las partes reconocen su responsabilidad de laborar conjuntamente para lograr el cumplimiento de los acuerdos contenidos en este Convenio en un plano de la mayor armonia y comprensión, a fin de hacer posible el fortalecimiento de sus relaciones cumpliendo sus deberes respectivos para

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В.

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CONVENIO COLECTIVO UNIDAD A AÑO 2011 - 2014 (25 mayo 2011) Pagina 60 de 75

COLLECTIVE BARGAINING AGREEMENT

HOSPITAL AUXILIO MUTUO DE PUERTO RICO, INC.

AND

UNIDAD LABORAL DE ENFERMERAS (OS) Y EMPLEADAS (OS)

DE LA SALUD (ULEES)

UNIT C

2011-2014

ARTICLE XXV GENERAL PROVISIONS

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P. ...

Q. ...

R. The Hospital shall keep, as at present, bulletin boards in the main "LOBBY", the cafeteria, and next to the general clock puncher so the Bargaining Unit posts notices, citations or any other written material necessary for its communication with the unionized employees. Notwithstanding, the Bargaining Unit shall not post in said bulletin boards, any written material that can be considered harmful, hurtful, or disrespectful or that in any form contains or represents propaganda against the good name of the company.

- El Hospital dispondrá de un medio adecuado para que los empleados Q. cubiertos por este Convenio registren su asistencia al trabajo. En el sistema de registro de ponches que el Hospital tiene instalado convenientemente, el empleado personalmente registrará la hora de entrada y salida y la hora en que empieza y termina su período de tomar alimentos.
- El Hospital mantendra como hasta el presente tablones de edictos en el R. "lobby" principal, la cafeteria y junto al reloj ponchador general para que la Unidad Laboral fije avisos, citaciones o cualquier otro material escrito que sea necesario para su comunicación con los empleados unionados. Disponiéndose, que la Unidad Laboral no podrá fijar en dichos tablones de edictos ningún material escrito que se considere lesivo, hiriente o irrespetueso o que en forma alguna contenga o represente propaganda contra el buen nombre de la empresa.

Las partes reconocen su responsabilidad de laborar conjuntamente para acust lograr el cumplimiento de los acuerdos contenidos en este Convenio en un plano de la mayor armonia y comprensión, a fin de hacer posible el fortalecimiento de sus relaciones cumpliendo sus deberes respectivos para elevar a un grado óptimo la calidad de los servicios que prestan sin menoscabo del derecho que les asiste en la defensa de sus intereses.

> La Unidad Laboral podrá referir candidatos a empleo dentro de la Unidad Contratante al Hospital y el Hospital los considerará en igualdad de

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CONVENIO COLECTIVO UNIDAD C AÑO 2011 - 2014 (25 mayo 2011) Pagina 69 de 82